SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1247.

Supreme Court, U.S.
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THE 931 EAST BOULEVARD COMPANY,

Petitioner,

v.

CITY OF CLEVELAND, WHITE MOTOR CORPORATION, EATON MANUFACTURING COMPANY, PARK DROP FORGE COMPANY, AND ROCKEFELLER BROTHERS FUND, INC.,

Respondents.

RESPONDENTS' BRIEF OPPOSING CERTIORARI.

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RESPONDENTS' BRIEF OPPOSING CERTIORARI.

QUESTIONS PRESENTED.

I. Where the appellant is charged with constructive notice of the entry of an order by the Ohio Court of Appeals, and notice of the entry is also given by publication in the exact manner provided for by the Court Rules, does the Federal Constitution require the Ohio Court to give some additional type of notice, even though none was anticipated by appellant's counsel?

Respondents submit that the answer to this question is "no." Should the answer be "yes," however, the following question would then be presented:

II. Where counsel for the appellant receives actual notice of an adverse judgment on the merits of his case in the Ohio Court of Appeals, but loses the opportunity to appeal to the Supreme Court of Ohio by following the wrong procedure under Ohio law, must the order in which the Court of Appeals subsequently rejects that procedure

be communicated to appellant by means other than those which the Court normally uses, even though the date of the order is of no significance under Ohio law?

STATEMENT OF THE CASE.

Alleging that it was the victim of an illegal "conspiracy" between respondent City of Cleveland and the other respondents herein, petitioner brought suit in the Common Pleas Court of Cuyahoga County, Ohio, to enjoin the respondent City from exercising its power of eminent domain to acquire, for public park purposes, a parcel of land owned by petitioner.

After a trial on the merits, the Common Pleas Court held that there was no illegal conspiracy and that petitioner was not entitled to an injunction. Judgment was accordingly entered in favor of respondents.

Petitioner then perfected an appeal to the Court of Appeals for the Eighth Appellate District of Ohio. The appeal was fully briefed and argued, and on January 12, 1967, the Court of Appeals announced its unanimous decision in favor of respondents. A journal entry reflecting the decision of the Court of Appeals on the merits was circulated among counsel for all of the parties, and this entry was approved by the Court and filed with the clerk for journalization on January 31, 1967.

Respondents' counsel had actual knowledge of the decision rendered by the Court of Appeals on the merits, and had actual knowledge of the journal entry of January 31, 1967, in which the Court of Appeals denied the petition for injunctive relief. Contrary to the implication petitioner may inadvertently have conveyed by its formulation of the first "question presented" at page 2 of the petition for certiorari, petitioner's counsel clearly *did* have "actual notice of an adverse ruling denying injunctive relief * * *

[before] time for appeal from that adverse ruling had expired * * *."

On February 10, 1967—well within the twenty-day period prescribed by Ohio law for perfecting an appeal to the Supreme Court of Ohio* petitioner filed in the Court of Appeals a pleading denominated an "application for a new trial." In this application** respondent asked the Court of Appeals for an order vacating the judgment of January 31, 1967, and granting a "new trial" in the Court of Appeals. As will be shown, Ohio law makes no provision for seeking a new trial in a reviewing court.

February 20, 1967—the last date on which petitioner was entitled to perfect an appeal to the Ohio Supreme Court—came and went without petitioner having filed the required notice of appeal. Instead, petitioner's counsel appeared in the Court of Appeals on that day and orally requested additional time within which to file a brief in support of the "application for a new trial." On February 23, 1967, petitioner was given leave to file such a brief by March 20, and respondents were directed to file answer briefs by April 20.

These briefs were duly filed within the time allowed, and on April 20, 1967, petitioner filed a reply brief in support if its application for a new trial.

Two weeks later, on May 4, 1967, the Court of Appeals entered an order denying the application for a new trial. In accordance with its regular practice, of which petitioner's counsel were admittedly aware,† the Court of Appeals caused notice of this ruling to be published on the same date under the "motion docket" section of the

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* See Ohio Revised Code Section 2505.07, the text of which is reproduced at pages 42 and 43 of the petition for certiorari.

** The full text is printed in the appendix at page 13, *infra*.

† See page 15 of the petition for certiorari.

column in *The Daily Legal News and Cleveland Reporter* wherein decisions of the Court of Appeals are reported. Only one other ruling was reported in the motion docket section on that date.

On June 16, 1967, petitioner filed a motion asking the Court of Appeals for judgment on its application for a new trial, or, in the alternative, for an order vacating the entry of May 4, 1967.* This motion was accompanied by an affidavit ** in which it was indicated that petitioner's counsel had not learned of the May 4 entry until June 7, 1967, notwithstanding that an employee of petitioner's counsel had been instructed to examine the *Legal News* regularly for notices of the actions taken by the Court of Appeals.

Petitioner's motion of June 16 was overruled, and the Supreme Court of Ohio subsequently rejected an appeal from the order overruling that motion. Petitioner now asks this Court for issuance of a writ of certiorari. For the reasons stated below, certiorari should be denied.

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* The text of the June 16 motion is set forth in the appendix at page 13, *infra*.

** The text of the affidavit is set forth at page 41 of the petition for certiorari.

REASONS FOR DENYING CERTIORARI.

I. Since Petitioner Was Charged With Constructive Notice of the Order Overruling Its Application For a New Trial, and Since the Court of Appeals Announced Such Order in Accordance With Its Established Court Rules and in a Manner Reasonably Calculated to Give Actual Notice, the Court Was Under No Constitutional Mandate to Furnish Any Additional Notice.

It has long been considered hornbook law that once a person comes into court as a party, he is charged with notice of all subsequent steps taken in the cause down to and including judgment. *Irving Trust Co. v. Spruce Apartments,* 44 F. 2d 218 at 222 (E. D. Pa. 1930). Cf. 66 *C. J. S.*, Notice, Section 12, at page 648. Such is unquestionably the rule followed by Ohio courts. See *Nomina v. Eggeman,* 188 N. E. 2nd 440, 442 (C. P. Putnam, 1962), where the Ohio cases are summarized as follows:

> "All parties must take notice of all court orders and all procedures of the trial. The fact that one may be a non-resident does not require special notices by the Court. The party must keep himself advised. Brickman v. Shale, 11 Ohio Cir. Ct. R., N. S., 41, 20 Ohio Cir. Ct. R. 372, aff'd 82 Ohio St. 425, 92 N. E. 1109; Pike v. Bradford, Dayton 295; Hahn v. McBride, 88 Ohio St. 511; 103 N. E. 760; Burrell v. Anchor F. Ins. Co., 3 Ohio N. R., N. S., 321, 15 Ohio Dec. N. P. 303, circuit court, aff'd 74 Ohio St. 465, 78 N. E. 1116; Southwood v. Jamison, 66 Ohio St. 290, 64 N. E. 135."

As a matter of convenience to counsel, the rules of the Ohio Courts of Appeals provide that in addition to the constructive notice which is automatically afforded to the parties in a cause when a ruling is entered in the official court records, notice of such rulings shall also be given either by mail or by publication in a daily legal news-

paper.* The Court of Appeals for the Eighth Judicial District of Ohio, which includes the City of Cleveland, has for many years followed the practice of publishing notice of its rulings in *The Daily Legal News and Cleveland Reporter,* rather than giving notice by mail. The Court did not capriciously single out the case at bar for giving notice by publication; it has uniformly followed the publication provision, as counsel for petitioner were perfectly well aware during the time that they were awaiting the Court's ruling on the motion for a new trial.

Under these circumstances, petitioner's counsel should reasonably have been expected to obtain timely knowledge of the Court's ruling, either from the notice published in the *Legal News* or from an inspection of the records at the courthouse. Once their reply brief had been filed on April 20, 1967, petitioner's counsel had every reason to expect that a ruling would be forthcoming promptly, and that such ruling would be readily accessible to anyone who wanted to check the docket at the courthouse, as counsel apparently did on June 7. Counsel knew further that notice of the ruling would not be mailed, but would be published in the Court of Appeals' motion docket column in the *Legal News.*

Knowing these facts, counsel should have been able to keep informed of the status of the case; and the Federal Constitution does not entitle petitioner to escape the consequences of its counsel's failure to keep informed. As stated in the majority opinion in *Link v. Wabash Railroad Co.*, 370 U. S. 626 at 633 and 634:

> "Petitioner voluntarily chose this attorney as his representative in the action, and he can not now avoid the consequences of the acts or omissions of this freely

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* See Rule VIII of the rules of the Courts of Appeals, set forth at pages 39 and 40 of the petition for certiorari.

> selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' Smith v. Ayre, 101 U. S. 320, 326."

The notice that was published in the *Legal News* on May 4 did not become constitutionally inadequate merely because petitioner's counsel overlooked it, any more than notice by mail would have been constitutionally inadequate if counsel had inadvertently misplaced a letter or card containing such notice.

The landmark case of *Mullane v. Central Hanover Bank and Trust Company,* 339 U. S. 306, on which petitioner places its primary reliance, dealt with the type of notice that must *precede* an adjudication of property rights. The question in *Mullane* was whether notice by publication was reasonably calculated to give knowledge of a forthcoming adjudication to a person who was not yet a party before the court, so that such person might be afforded an opportunity to obtain counsel, come into court and be heard.

No such question is presented in the instant case. Here the adjudication with respect to petitioner's property rights had been initiated by petitioner itself. Petitioner had voluntarily come into court, and had taken full advantage of its right to be heard. Neither logic nor authority supports petitioner's contention that as an active party, represented by counsel and "deeply committed" to challenging the respondent City's right to exercise its power of eminent domain, petitioner was constitutionally entitled to be treated as though it were not a party and had no reason to know of the lawsuit or to follow its progress.

II. The Judgment of the Ohio Court Rested on an Adequate State Ground in Any Event, Since Under Ohio Law Petitioner Had Lost Its Right to an Appeal on the Merits Long Before the Date on Which the Application For a "New Trial" Was Overruled.

Where denial of a motion to vacate the judgment of a state appellate court rests upon an adequate state ground, such as the petitioner's choice of the wrong remedy under local law, certiorari should be denied regardless of what force the petitioner's constitutional argument may have. *Edelman v. California*, 344 U. S. 357, at 361 and 362. Even if the Ohio Court of Appeals used a constitutionally inadequate method to announce its order overruling the motion for a new trial, certiorari should still be denied if the decision to let that order stand is justified by petitioner's choice of the wrong remedy under Ohio law.

In moving the Court of Appeals for a new trial, petitioner did choose the wrong remedy. While the Ohio statutes governing appellate procedure authorize an application for reconsideration, petitioner's motion was not filed within the time which the statute prescribes for filing such applications.* The Ohio statutes do not provide for a motion for a new trial in a reviewing court. See *McKee v. Clark*, 55 Ohio L. Abs. 496, 90 N. E. 2d 584 (Ct. App. Franklin, 1949), where it was held that:

> "There is no provision in the General Code for the filing of a motion for a new trial in a reviewing court and therefore the date of the overruling of the appellant's motion for a new trial is of no significance." **

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* See Ohio Revised Code Section 2505.071, the text of which is set out in the appendix at page 14, *infra*.

** Respondents cited this case to the Court of Appeals in their brief opposing the motion for a new trial, and to the Ohio Supreme Court in their brief opposing jurisdiction in that court.

Ohio Revised Code Section 2321.19, cited at page 4 of the petition for certiorari as authority for filing an application for a new trial, does not relate to appellate procedure. The application for a new trial to which that statute refers is the application authorized in Ohio Revised Code Section 2321.17. Section 2321.17 is found in Title XXIII of the Code, which relates to the Common Pleas Court; it provides that under certain conditions "a final order, judgment, or decree shall be vacated and a new trial granted *by the trial court* on the application of a party aggrieved * * *." (Emphasis supplied.) By the same token, Ohio Revised Code Section 2321.19 provides that such application for a new trial "must be made within ten days after the journal entry of a final order, judgment, or decree has been approved *by the trial court* * * *." (Emphasis supplied.) The trial court in the instant case was the Court of Common Pleas, which had entered its judgment almost a year before the application for a new trial was filed in the Court of Appeals.

Since the Ohio statutes do not provide for a motion for a new trial in a reviewing court, and since petitioner failed to make a timely application for reconsideration, the motion that petitioner filed in the Court of Appeals on February 10, 1967, did not and could not enlarge the time for perfecting an appeal to the Ohio Supreme Court. Petitioner's right to appeal to the Supreme Court on the merits expired on February 20, 1967, twenty days after the Court of Appeals entered its judgment denying injunctive relief. Having missed the boat in February, petitioner did not have a second chance to catch the boat in May. No such second chance would have been presented even if petitioner had learned immediately of the overruling of the motion for a new trial on May 4th. As pointed out in *McKee v. Clark*, 55 Ohio L. Abs. 496, 90 N. E. 2d 584

(Ct. App. Franklin, 1949), *supra*, "the date of the overruling of the appellant's motion for a new trial is of no significance."

Having lost its right of appeal because it chose to pursue the wrong procedure, petitioner has no basis for a claim that due process of law has been denied. See *American Surety Company v. Baldwin*, 287 U. S. 156 at 168 and 169, where this Court, speaking through Justice Brandeis, made the following statement:

> "The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course, the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error, does not furnish the basis for a claim that due process of law has been denied."

Justice Brandeis' reasoning fits this case perfectly. Petitioner should have appealed directly to the Supreme Court of Ohio, within the time prescribed by statute, instead of moving for a new trial. The opportunity to appeal on the merits was lost on February 20, 1967, when the statutory time for such an appeal expired. Under Ohio law, it would have been too late for petitioner to rectify its error after that time irrespective of when it learned that the wrong procedure had been followed; and nothing in the Federal Constitution required the state courts to extend the time for an appeal beyond the time fixed by the Ohio statute.

With regard to appeals within the federal court system, this Court, in the exercise of its discretion, has dis-

missed an appeal because it was docketed twenty-two days after the expiration of the period prescribed by Court Rule. *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U. S. 32. Surely the Ohio courts are under no constitutional mandate to shut their eyes to a similar time limitation that is prescribed not by rule of court, but by statute.

CONCLUSION.

As an active party, represented by counsel, petitioner knew that there would be a ruling on its motion for a new trial, knew that such ruling would be entered in the Court's docket and journal, and knew that notice of the entry would be given in the *Legal News* rather than by mail. The notice thus given was reasonably calculated to inform petitioner's counsel of the Court's action, was given in the manner actually anticipated by petitioner's counsel, and was not constitutionally defective.

Moreover, petitioner's rights were in no way prejudiced by its failure to obtain immediate knowledge of the overruling of the motion for a new trial. By pursuing the wrong remedy under Ohio law, petitioner had long since lost its right of further appeal on the merits of the case; and that was the fact regardless of the kind of notice given when the motion for a new trial was overruled.

The petition for a writ of certiorari presents no substantial federal question, and certiorari should be denied.

Respectfully submitted,

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APPENDIX.

APPLICATION FOR A NEW TRIAL.

(Filed in the Court of Appeals on February 10, 1967.)

The appellant, The 931 East Boulevard Company, hereby applies to the Court for an order vacating the final order and judgment entered by this Court herein on January 31, 1967, and granting to the appellant a new trial of this cause in this Court for the following causes, each of which materially affects the substantial rights of the appellant:

1. the final order, judgment and decree of this Court is not sustained by sufficient evidence;
2. the final order, judgment and decree is contrary to law; and
3. error of law occurred at the trial of this cause in this Court and was affected [*sic*] to by the appellant.

MOTION FOR JUDGMENT OR, IN THE ALTERNATIVE, TO VACATE JUDGMENT OR ORDER.

(Filed in the Court of Appeals on June 16, 1967.)

The appellant, The 931 East Boulevard Company, moves the Court for judgment on its application for new trial or, in the alternative, an order vacating and setting aside the purported journal entry which was ostensibly entered herein on May 4, 1967, which alleged order reads as follows: "Application by plaintiff-appellant for new trial denied. Exceptions."

This Motion is made for the reasons set forth in the attached brief and upon the facts set forth in the attached affidavit.

STATUTES.

Ohio Revised Code § 2505.071. Application for reconsideration of cause or motion.

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court in writing, and filed with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the earlier. If an application for reconsideration has been filed within such time, the court shall not journalize the order or judgment until such application has been disposed of.

No oral argument of an application for reconsideration shall be permitted except at the request of the court on its own motion.